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EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 601.

CHARLES A. GREGORY, APPELLANT,

vs.

JOHN C. KEMP VAN EE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

RECORD FILED MAY 3, 1895.

(15,886.)

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(Record, page 3.)

Bill of Complaint.

(Filed in supreme judicial court of Massachusetts Dec. 16, 1884.)

Charles A. Gregory, of the city of Chicago and State of Illinois and a citizen of said State of Illinois, brings this his bill of complaint against Francis A. Pike, of Calais, in the State of Maine, and citizen of said State of Maine, and William C. N. Swift, of the city of New Bedford, in the State of Massachusetts, and a citizen of said State of Massachusetts.

And thereupon the plaintiff complains and says that on or before the thirtieth day of March, 1883, he was the owner of eighty thousand shares of the capital stock of the Great Sierra Consolidated Silver Company of Chicago, Illinois, a corporation duly established under the laws of the said State of Illinois, and, being such owner, he delivered the same to one George W. Butterfield, in the city of Boston, Massachusetts, and took of said Butterfield a receipt or declaration of trust in the words and figures following, to wit:

BOSTON, *March* 30, 1883.

Received of Charles A. Gregory 80,000 shares of the stock of the Great Sierra Consolidated Silver Company of Chicago, Illinois. I take the same to have it registered upon the books of the company in the name of George W. Butterfield, of San Francisco, as trustee, and I will deliver the same to said Gregory on demand, and in the meantime hold the same in trust for him as his property.

G. W. BUTTERFIELD.

That said Butterfield procured the said shares to be registered in his own name on the books of said corporation, and thereafter, on or about the fourth day of April, 1883, negotiated the sale of said shares to the defendant Swift for the sum of $46,400, and in payment for said shares took or received from said Swift five thousand dollars in cash and his two notes of hand, dated April 4, 1883, each for $20,334.60, payable to the order of said George W. Butterfield, one payable in two years and one in three years after said date, with interest at the rate of six per cent. per annum; and the plaintiff says that the said Butterfield indorsed the same and then delivered to him the said two notes of said Swift for $20,334.60, at the city of New York, on the 9th day of April, 1883, when the plaintiff was to embark for Europe on the next day thereafter, to be absent for some time, and did so embark and was in fact absent from this country till the January following; that he, the plaintiff, then and there, on the 9th day of April aforesaid, returned the said notes to the said Butterfield on the execution and delivery by said Butterfield to him of an agreement or declaration of trust in the words and figures following, to wit:

NEW YORK, *April 9th*, 1883.

I hold in my hand notes of W. C. N. Swift, dated New Bedford, Mass., 1883, 4m., 4th, one due two years after date for $20,334.60, one due three years after date for $20,334.60, payable to order of Geo. W. Butterfield, with interest at six per cent. per annum. These two notes belong to Chas. A. Gregory and the proceeds of them, and I agree to deliver the same to him upon request or the full amount of money expressed therein, and I also owe an account and payment to said Gregory for $730.80, being his *pro rata* of the two other notes of similar description held by me belonging to J. C. Kemp. Gregory is entitled to one-half of this $730.80 in two years and one-half in three years, with interest as above.

G. W. BUTTERFIELD.

And the plaintiff says that said Butterfield became thereby the bailee, depositary, or holder of said two notes in trust for the plaintiff and subject to the plaintiff's orders concerning the same and had no power or authority from the plaintiff to dispose of said notes in any way, unless, perhaps, to receive payment thereof from said Swift, to whom the said Butterfield had promised and agreed that said notes should not be put on the market for sale or offered for discount; and the plaintiff further shows that the said Butterfield, soon after the receipt of the said two notes from said Gregory as aforesaid (to wit, on or about the tenth day of April, 1883), passed over the said notes to one Charles F. Jones, his friend and associate, who was then cognizant of the fact that the said notes belonged to the plaintiff and were held by the said Butterfield as trustee for the plaintiff as aforesaid and not otherwise, and the said Jones took the said notes to the said Swift, the maker, and gave up or surrendered the same to him, taking in place of one of said notes an instrument, dated April 20, 1883, signed by said Swift, by which he promised to pay to said Jones a like sum of $20,334.60 in three years from date, with interest, but not negotiable, and in place of the other note of $20,334.60 the said Jones took in part another instrument, dated April 20, 1883, signed by said Swift, by which he promised to pay to said Jones the sum of $15,000 or thereabouts (the precise sum being unknown to the plaintiff at this time, but is believed to be about $15,000), payable in two years from its date, with interest, but not negotiable.

And the plaintiff, further complaining, shows that these two contracts or instruments in writing signed by said Swift, sometimes called notes, for the payment to said Jones only of said sums of $20,334.60 and of $15,000 or thereabouts, were by the said Jones passed over to the said Butterfield, to be by him held in the place of and instead of the two notes of $20,324.60 each, intrusted to him by the plaintiff as aforesaid, and the plaintiff says that the said two new notes or contracts drawn payable only to the said Jones and coming into the hands of the said Butterfield in renewal of or substitution for the two notes first given to said Butterfield by said Swift were affected by the same trust in favor of the plaintiff which was attached to the said two notes last mentioned when placed in

the hands of said Butterfield, as trustee for the plaintiff, as above set forth.

And the plaintiff says that the said Butterfield had no right to deal with the said new instruments as his own and took no title whatever thereto from or under the said Jones as payee or assignor of the same to him, but stood in the same relation to the said Gregory with regard to the said two notes or instruments which he previously held respecting the two original notes of said Swift, as above mentioned, payable to the said Butterfield and exchanged for the two new notes or instruments made payable to said Jones.

And the plaintiff, further complaining, shows that the said Butterfield, while thus holding the two said last-named instruments in special trust for the plaintiff as aforesaid, viz., on the 31st day of July, 1883, entered into a certain contract in writing with the defendant Pike, a copy of which is annexed hereto, marked "Exhibit A," and is a part hereof, by which contract the said Butterfield undertook and agreed to purchase of the said Pike certain mining property situated in California and to pay therefor to said Pike the sum of $242,666, payable as follows, viz:

The sum of $25,000 at the time of the execution of the contract and the residue, to wit, $217,266, on or before the first day of January, 1884; and the said Pike was not to give to said Butterfield any title to the mining property so contracted for by him until the purchase-money thereof should have been paid in full; and the said Butterfield had no means and was unable to meet the cash payment of $25,000, and was known by said Pike to be unable to make the payment at the said time; and thereupon the said Butterfield, acting in fraud of the plaintiff and in violation of the agreement or trust assumed by him in regard to the notes of said Swift originally confided to him by the plaintiff as aforesaid, and subsequently exchanged for the new non-negotiable notes payable to said Jones as aforesaid, delivered or passed over to said Pike the said two instruments of April 20, 1883, by way of pledge as collateral security for the payment of the said sum of $25,000, making part of the amount to be paid by him to the said Pike as purchase-money for the said mining property of the said Pike.

And the plaintiff is informed and believes, and therefore says, that the said two instruments signed by said Swift under date of April 20, 1883, and payable to the said Jones, the name of said Jones having been previously placed by him upon the back of said instruments, were delivered to and lodged with said Pike by said Butterfield as and for security for the $25,000 payment, as set forth in the memorandum entered at the back of said contract "A" and hereby made a part of this bill by reference.

And the plaintiff, further complaining, shows that just previously to the execution of this contract of July 31, 1883, the said Butterfield represented to the plaintiff that he still remained in possession of the two notes first given by said Swift of $20,334.60 each, and that the plaintiff did not learn of the substitution by said Butterfield of said instruments for said two original notes, nor of the attempt of the said Butterfield to pledge said new instruments to

said Pike as security for the payment of his own engagement for $25,000, until long afterwards, to wit, until some time in December, 1883; and thereupon the plaintiff made demand, both upon the said Butterfield and the said Pike, for the surrender and delivery to himself of the said two notes or instruments of April 20, 1883, notifying the said Pike at the same time of his ownership of the said notes or instruments before the same were passed over to him by said Butterfield by way of pledge as aforesaid; and the plaintiff further shows that the contract entered into with said Pike on the 31st day of July, 1883, for the purchase of said mining property was never carried into execution or performed by either the said Butterfield or the said Pike, but was abandoned by them, the said Pike retaining the said property or his title thereto as before and still continuing to hold the same, as the plaintiff is informed and believes, and being no longer bound by his said contract of July 31, 1883, nor holding the said Butterfield as bound thereby, but electing to treat said contract as mutually abandoned by both parties; and the plaintiff is informed and believes, and therefore avers, that said Pike is about to enter into negotiations for the sale of said mining property to other persons at a rate or price beyond that specified in the contract of sale to Butterfield, dated July 31, 1883, above mentioned; and the plaintiff shows that it would be contrary to equity to retain the two notes so pledged to him as security for part of the price to be paid by said Butterfield for said mining property and at the same time to sell the said mining property to others for its full value.

And the plaintiff further shows that the said Pike having thus come into possession of the said notes or instruments, being at the time the property of the plaintiff, through the fraud of the said Butterfield or his breach of trust, and to enable him, said Butterfield, to obtain from said Pike the contract of July 31, as above mentioned, the said Pike now holds no title to the said notes or instruments by reason of the delivery or pledge thereof to him made by said Butterfield, but holds them as trustee for the plaintiff as fully as the said Butterfield himself was such trustee, and so the said Pike is in equity bound to surrender the said notes to the plaintiff, as he has been heretofore requested to do; and the plaintiff, further complaining, shows that the said Swift has been notified by the plaintiff of his ownership of the said notes or instruments and of the fraud practised on the plaintiff by delivering or pledging the same to said Pike as aforesaid, and has been cautioned by the plaintiff to pay the same to no one but the plaintiff, and that the plaintiff will indemnify said Swift against the claims of any one else upon or against him, the said Swift, by reason of the said notes or instruments.

And the plaintiff further shows that the said instruments — not promissory notes in the legal sense of that term, nor negotiable or transferable as such by indorsement, but are simple contracts for the payment of money to the said Jones and him only, and that the fraudulent pledge or deposit of said notes or instruments with the said Pike as aforesaid has not conferred on said Pike any right of action whatever against the said Swift upon said instruments, and that said Swift cannot lawfully discharge said instruments or con-

tracts by dealing in relation thereto with the said Pike or any one excepting this plaintiff.

And the plaintiff further shows that the said Pike, unless restrained by the order or decree of this court, may undertake to sell or transfer the said two notes or instruments to some person who is not cognizant of the facts hereinabove set forth in regard to the plaintiff's ownership thereof and has threatened to do so or to expose the same to sale by auction, or the said Pike might place them beyond the reach of the plaintiff or surrender them to the said Swift or to the said Butterfield or the said Jones, or execute a release or discharge thereof in some way under the pretence of lawful authority to do so; and the said Swift, unless restrained by this honorable court, might also procure the surrender of the said notes or contracts by the said Pike to him in disregard of the right of the plaintiff in and to the same; and this plaintiff is apprehensive lest the said Pike may deal with said notes in some of the ways above mentioned unless restrained by this honorable court.

To the end, therefore, that the said Pike may be compelled by decree of this honorable court to surrender the said two notes or contracts of the said Swift and deliver them over to the plaintiff and may be restrained from dealing with another person than the plaintiff as the lawful owner of the said notes or contracts, and from making payment of the same or of any part thereof except to the plaintiff, and that the plaintiff may have such other and further relief in the premises as he may be entitled to, the plaintiff prays that the usual process of subpœna may issue, directed to the said Francis A. Pike and the said William C. N. Swift, requiring them respectively to appear in this honorable court and make answer to this bill of complaint, the plaintiff hereby waiving any answer upon oath by either of said defendants.

CHARLES A. GREGORY.

F. A. BROOKS,
Solicitor for Plaintiff.

* * * * * * *

(Record, page 26.)

Petition for Removal to Circuit Court.

(Filed in supreme judicial court of Massachusetts April 28, 1885.)

To the honorable the justices of the supreme judicial court for the county of Suffolk and Commonwealth of Massachusetts:

Your petitioner, Charles A. Gregory, plaintiff in the above-entitled suit, respectfully shows that the matter and amount in dispute in said cause exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States; that said petitioner at the time of bringing said suit was and still is a citizen of the State of Illinois; that the said Frederick A. Pike, one of the defendants, then was and still is a citizen of the State of Maine; that William C. N. Swift, the other defendant, then was and still is a citizen of the State of

Massachusetts; and your petitioner shows that the present April term of said court is the first term at which said cause could be tried, and your petitioner desires to remove this suit, before the trial thereof, into the next circuit court of the United States, to be held in the district of Massachusetts on the fifteenth day of May next, at Boston, in said district, pursuant to the provisions of law contained in the act of Congress approved March 3, 1875, and your petitioner offers herewith his bond, with good and sufficient surety, for entering in the said circuit court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if it shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further in said cause except to make the order of removal required by law, and to accept the said bond, and to cause the record of this suit in this court to be removed into the said circuit court of the United States at the next term thereof to be held as aforesaid.

CHARLES A. GREGORY.

F. A. BROOKS,
Solicitor for Plaintiff.

A true copy.
Attest: JOHN NOBLE, *Clerk.*

* * * * * * *

(Record, page 28.)

Order for Removal to Circuit Court.

(Entered in supreme judicial court of Massachusetts May 5, 1885.)

And now, in the above-entitled cause, it appearing to the court that the plaintiff has duly filed in this court his petition praying for the removal of said cause to the circuit court of the United States for the district of Massachusetts, and also a satisfactory bond, pursuant to the statute of the United States:

It is ordered that this cause be removed to the circuit court of the United States, in accordance with the prayer of said petition.

By the court:

JOHN NOBLE, *Clerk.*

May 5, 1885.

A true copy.
Attest: JOHN NOBLE, *Clerk.*

* * * * * * *

(Record, page 55.)

Motion to Make J. C. Kemp Van Ee a Defendant.

(Filed Dec. 11, 1885.)

Now comes William C. N. Swift, one of the defendants in the above-entitled cause, and moves that this honorable court may

order J. C. Kemp Van Ee, named in the answer of this defendant, filed April 14, 1885, to be made a party defendant in the said cause.

WILLIAM C. N. SWIFT,
By his solicitor, HENRY W. SWIFT.

* * * * * * *

(Record, page 55.)

Petition of John C. Kemp Van Ee.

(Filed Dec. 22, 1885.)

Petition of John C. Kemp Van Ee to be made a party defendant.

To the honorable the justices of the circuit court of the United States, sitting in equity:

Petitioning, showeth unto your honors, John C. Kemp Van Ee, of London, England, in the Kingdom of Great Britain, that the said Gregory, plaintiff in the said suit, in his bill of complaint, among other things, refers to and describes a certain instrument, dated April 20, A. D. 1883, and signed by the defendant Swift, by which the said Swift promised to pay one Charles F. Jones the sum of fifteen thousand (15,000) dollars, or thereabouts, payable in two years from its date, with interest, but not negotiable, which said instrument is now due and payable and is wrongfully in the possession of the defendant Frederick A. Pike: that the said Gregory in his said bill of complaint lays claim to the whole of the proceeds of said instrument, and prays in his said bill that the said defendant, Pike, may be compelled by decree of this honorable court to surrender the said instrument and to deliver it to him, the said Gregory, and may be restrained from dealing with any other person than the plaintiff Gregory as the lawful owner of said instrument, and from making payment of the same or any part thereof except to the plaintiff Gregory.

And your petitioner further shows that he was at the time of and for a long time previous to the bringing of said bill of complaint and that he is now owner of a one-half interest in the instrument above described in the said plaintiff's bill of complaint and is entitled to receive one-half of the proceeds of said instruments, and is entitled to the possession of said instrument, equally with the said Gregory, as against the said defendant, Pike; all of which will more fully appear in your petitioner's answer to said bill of complaint to be hereafter filed if your petitioner be made a party defendant in said suit.

Wherefore your petitioner, in order to enable this honorable court to do equity in said suit, respectfully prays this honorable court that he may be joined in said suit as a party defendant thereto, and that as such defendant he may be allowed to file his answer in said suit, duly presenting his claim to this honorable court.

JOHN C. KEMP VAN EE,
By WILLIAM F. WHARTON,
His Solicitor.

* * * * * * *

(Record, page 62.)

Order of Court.

(Filed Jan. 22, 1886.)

COLT, *J.:*

The petition of John C. Kemp Van Ee to be made a party defendant is granted.

The motion of Swift, defendant, to make J. C. Kemp Van Ee a party defendant is granted.

The motion of Swift, defendant, to allow the deposition of J. C. Kemp Van Ee as a part of the record in the case is granted.

The motion of defendant Swift to make George W. Butterfield a party defendant is granted.

The motion of the complainant for dismissal of bill as to defendant Swift is denied.

By the court:

JOHN G. STETSON, *Clerk.*

* * * * * * *

(Record, page 63.)

Answer of John C. Kemp Van Ee.

(Filed March 13, 1886.)

And this defendant now comes and claims to be interested in the matters of this suit by virtue of the circumstances hereinafter set forth.

1. It is true that on or about the fourth day of April, 1883, one George W. Butterfield negotiated the sale to the defendant William C. N. Swift of eighty thousand shares of the capital stock of the Great Sierra Consolidated Silver Company of Chicago, Ill., belonging to the plaintiff.

2. And this defendant further answers and says that at the same time and as part of the same transaction of sale the said George W. Butterfield also negotiated the sale to the said defendant, William C. N. Swift, of about seventy-nine thousand shares of the capital stock of said Great Sierra Consolidated Silver Company belonging to this defendant.

3. That, in payment for the one hundred and fifty-nine thousand shares of the capital stock of the said Consolidated Silver Company so sold, the said defendant, Swift, gave the said Butterfield ten thousand dollars in cash and four negotiable promissory notes signed by the defendant Swift, each for $20,334.60, two at two years, two at three years, payable to said Butterfield or order; that of the cash so received by the said Butterfield $5,000 was paid to the plaintiff Gregory, $500 to this defendant, and the remainder, $4,500, was retained by the said Butterfield, which said remainder rightfully belongs to this defendant, and the said Butterfield has given no acknowledgment or receipt therefor to this defendant; that this

defendant holds and still has in his possession said acknowledgment or receipt and has never at any time received the said $4,500 or any part thereof.

4. That the four notes were left in the possession of said Butterfield by the plaintiff and by this defendant; that this defendant owned two of these notes, one for two years and one for three years, and that the plaintiff owned the other two notes; that this defendant gave authority to the said Butterfield to raise ten thousand dollars on the two years' note belonging to him in order to fulfil the terms of a certain contract between this defendant and said Butterfield and one Charles F. Jones, dated April 7, 1883, made at or about the time that the notes were left in the possession of said Butterfield; that at or about the same time a similar authority was given by the plaintiff to said Butterfield, whereby the plaintiff authorized the said Butterfield to raise ten thousand dollars upon the two years' note belonging to him, the said plaintiff; that the said Butterfield had no authority at any time from this defendant to dispose of the notes so belonging to this defendant in any way except as above authorized, but held the said notes so belonging to this defendant in trust for this defendant to deliver them to this defendant whenever he should demand the same.

5. That subsequently, on or about April 20, 1883, the said Butterfield delivered all of said four notes to one Charles F. Jones, who exchanged them with the defendant Swift for five other promissory notes, as follows, viz., one note for $10,000, at four months, payable to the said Charles F. Jones or order; one for $15,000, at six months, payable to the said Charles F. Jones or order, and one for $15,000, payable in two years, to Charles F. Jones, and two notes for $20,334.60 each, payable to Charles F. Jones in three years; and this defendant is informed that the two negotiable notes for $10,000 and $15,000 were negotiated by the said Jones or Butterfield, and that $20,000 of the money so procured was applied by the said Butterfield and Jones to the purposes authorized by this defendant and by the plaintiff to fulfil the terms of the contracts of April 7, 1883, already referred to, $10,000 for the benefit of this defendant and $10,000 for the benefit of the plaintiff; that the remaining $5,000 was appropriated by the said Butterfield and Jones for their own purposes, and this defendant alleges that he has never received any part of said $5,000.

And the defendant further answers and says that he received from Butterfield or Jones one of the notes for $20,334.60, and that the other note for $20,334.60 is the note now in possession of the defendant Pike, to which note this defendant makes no claim; that the remaining note for $15,000 is also in the hands of the defendant Pike; that in this note this defendant alleges and claims that he has a one-half interest, and, as the note is due, that he is entitled to receive one-half of the proceeds of it from the defendant Swift when paid.

6. And this defendant further alleges that on or about Jan. 2, 1884, it was expressly agreed between the plaintiff and this defendant that this defendant was entitled to one-half interest in said note

for $15,000 and to one-half of the proceeds thereof in settlement of any and all claims that this defendant had against the plaintiff arising from said sale of his shares of the capital stock of said Great Sierra Consolidated Silver Company.

7. And this defendant further answers that he believes it to be true that the said Butterfield entered into the contract with the defendant Pike, as set out in the plaintiff's bill of complaint, a copy of which is annexed to said bill, marked "Exhibit A," to which reference is made for a fuller statement thereof; and he further alleges and states that the said Butterfield, acting in fraud of this defendant and in violation of the agreement made by him with this defendant regarding said notes of said Swift originally confided to him by this defendant as aforesaid and without the knowledge or consent of this defendant, undertook to deliver or pass over to the said defendant, Pike, the said note for $15,000, of April 20, 1883, by way of pledge as collateral security for the payment of the sum of $25,000, which was part of the amount to be paid by him, the said Butterfield, to the said Pike under said contract made by him with the said Pike, date- July 31, 1883.

8. And this defendant further answers and says that he was not informed and did not learn that said Butterfield had attempted to pledge said note for $15,000 to the said Pike as aforesaid until after the same had been delivered over to the said Pike by the said Butterfield, namely, until some time in the month of October, 1883, and that this defendant has never assented or agreed in any way to the possession of said note by the defendant Pike; that on or about Dec. 11, 1883, this defendant made demand upon the said Pike for the surrender and delivery up of the said note by an instrument dated Dec. 11, 1883, and signed by this defendant, which is annexed to the answer of the defendant Pike and marked "A," to which reference is made, notifying the defendant Pike at the same time that he was the owner of an interest in said note for $15,000; that this defendant, moreover, on or about April 10, 1885, notified the defendant Swift that he claimed a one-half interest in the said note for $15,000, wrongfully attempted to be pledged by the said Butterfield or Jones to the said defendant, Pike.

9. And this defendant further answers and says that the contract entered into by the said Butterfield with the said defendant, Pike, dated July 31, 1883, was never performed by either the said Butterfield or the said Pike, but was and has been for some time abandoned by both of them, but that the said defendant, Pike, still wrongfully retains the said note of $15,000, and refuses to deliver the same to this defendant, and has brought suit in this honorable court in the name of said Jones, to whom the said note is made payable, against the defendant Swift to recover the amount thereof to his own use.

And this defendant prays that one-half of said note for $15,000, now in the possession of the defendant Pike, be decreed to be due this defendant; that the said defendant, Swift, be ordered to pay said one-half to this defendant and be enjoined from paying the same to any other person whatever, and that the said Butterfield be ordered

to pay to this defendant such sum as may be due from him to this defendant.

J. C. KEMP VAN EE,
By WILLIAM F. WHARTON,
His Solicitor.

* * * * * * *

(Record, page 114.)

Circuit Court of the United States, District of Massachusetts. In Equity.

JOHN C. KEMP VAN EE, Complainant,
v.
CHARLES A. GREGORY *et al.*, Defendants. } No. 2170.

Cross-bill.

(Filed by leave of court Nov. 27, 1886.)

To the judges of the circuit court of the United States for the district of Massachusetts:

John C. Kemp Van Ee, of London, England, in the Kingdom of Great Britain, and a citizen of said Kingdom, brings this his bill against Charles A. Gregory, of the city of Chicago and State of Illinois, a citizen of said State of Illinois; Francis A. Pike, of Calais, in the State of Maine, and a citizen of said State of Maine; William C. N. Swift, of the city of New Bedford, in the Commonwealth of Massachusetts, and a citizen of said Commonwealth; and George W. Butterfield, of San Francisco, in the State of California, and a citizen of said State of California.

And thereupon the plaintiff complains and says that he is a defendant by order of this honorable court to the original bill of complaint against the said Francis A. Pike and William C. N. Swift by Charles A. Gregory, a copy of the full record of which case and all the proceedings therein is hereto annexed and marked "A."

And the plaintiff further shows that the said defendants, Gregory, Pike, Swift, and Butterfield, are the same persons as the persons of like name named in the said original bill of complaint.

And the plaintiff further shows that on or about the fourth day of April, 1883, at the time when the said Butterfield negotiated the sale to the said Swift of the eighty thousand shares of the capital stock of the Great Sierra Consolidated Silver Company of Chicago, Illinois, belonging to the said Gregory, as is alleged in said original bill of complaint, the said Butterfield, at the same time and as a part of the same transaction of sale, also negotiated the sale to the said defendant, William C. N. Swift, of about seventy-nine thousand shares of the capital stock of said Great Sierra Consolidated Silver Company belonging to the plaintiff.

That in payment for the one hundred and fifty-nine thousand shares of the capital stock of the said Consolidated Silver Company so sold the said defendant, Swift, gave the said Butterfield ten

thousand dollars in cash and four negotiable promissory notes signed by the defendant Swift, each for $20,334.60, two at two years, two at three years, payable to said Butterfield or order; that of the cash so received by the said Butterfield $5,000 was paid to the defendant Gregory, $500 to the plaintiff, and the remainder, $4,500, was retained by the said Butterfield, which said remainder rightfully belongs to the plaintiff, and the said Butterfield has given an acknowledgment or receipt therefor to the plaintiff; that the plaintiff holds and still has in his possession said acknowledgment or receipt, and has never at any time received the said $4,500 or any part thereof.

That the four notes were left in the possession of said Butterfield by the said Gregory and by the plaintiff; that the plaintiff owned two of these notes, one for two years and one for three years, and that the said Gregory owned the other two notes; that the plaintiff gave authority to the said Butterfield to raise $10,000 on the two years' note belonging to him in order to fulfil the terms of a certain contract between the plaintiff and said Butterfield and one Charles F. Jones, dated April 7, 1883, made at or about the time that the notes were left in the possession of said Butterfield; that at or about the same time a similar authority was given by the said Gregory to said Butterfield, whereby he authorized the said Butterfield to raise $10,000 upon the two years' note belonging to him, the said Gregory; that the said Butterfield had no authority at any time from the plaintiff to dispose of the notes so belonging to the plaintiff in any way except as above authorized, but held the said notes so belonging to the plaintiff in trust for the plaintiff to deliver them to the plaintiff whenever he should demand the same.

That subsequently, on or about April 20, 1883, the said Butterfield delivered all of said four notes to one Charles F. Jones, who exchanged them with the defendant Swift for five other promissory notes as follows, viz., one note for $10,000, at four months, payable to the said Charles F. Jones or order; one for $15,000, at six months, payable to the said Charles F. Jones or order, and one for $15,000, payable in two years to Charles F. Jones, and two notes for $20,334.60 each, payable to Charles F. Jones in three years; and the plaintiff is informed that the two negotiable notes for $10,000 and $15,000 were negotiated by the said Jones or Butterfield, and that $20,000 of the money so procured was applied by the said Butterfield and Jones to the purposes authorized by the plaintiff and by the said Gregory to fulfil the terms of the contracts of April 7, 1883, already referred to, $10,000 for the benefit of the plaintiff and $10,000 for the benefit of the said Gregory; that the remaining $5,000 was appropriated by the said Butterfield and Jones for their own purposes, and the plaintiff alleges that he has never received any part of said $5,000.

And the plaintiff shows that he received from Butterfield or Jones one of the notes for $20,334.60, and that the other note for $20,334.60 is the note now in the possession of the defendant Pike, to which note the plaintiff makes no claim; that the remaining note for $15,000 is also in the hands of the defendant Pike, as hereinafter described.

That in this note the plaintiff alleges and claims that he has a one-half interest, and, as the note is due, that he is entitled to receive one-half of the proceeds of it from the defendant Swift, when paid.

And the plaintiff further shows that on or about Jan. 2, 1884, it was expressly agreed between the plaintiff and said Gregory that the plaintiff was entitled to one-half interest in said note for $15,000 and to one-half of the proceeds thereof in settlement of any and all claims that the plaintiff had against said Gregory arising from said sale of his shares of the capital stock of said Great Sierra Consolidated Silver Company.

And the plaintiff further shows that he is informed and believes that the said Butterfield entered into the contract with the defendant Pike as set out in the said original bill of complaint of the said Gregory against the said Pike and Swift, a copy of which is annexed to said bill, marked "Exhibit A," to which reference is made for a fuller statement thereof; and he further shows that the said Butterfield, acting in fraud of the plaintiff and in violation of the agreement made by him with the plaintiff regarding said notes of said Swift originally confided to him by the plaintiff as aforesaid and without the knowledge or consent of the plaintiff, undertook to deliver or pass over and did deliver and pass over to the said defendant, Pike, the said note for $15,000 of April 20, 1883, by way of pledge as collateral security for the payment of the sum of $25,000, which was part of the amount to be paid by him, the said Butterfield, to the said Pike under said contract made by him with the said Pike, dated July 31, 1883, and that the said defendant, Pike, knew that the said Butterfield had no authority from the plaintiff to deliver said note to him or to deliver the same to any person other than the plaintiff.

And the plaintiff further shows that he was not informed and did not learn that said Butterfield had attempted to pledge said note for $15,000 to the said Pike as aforesaid until after the same had been delivered over to the said Pike by the said Butterfield, namely, until some time in the month of October, 1883, and that the plaintiff has never assented or agreed in any way to the possession of the said note by the defendant Pike; that on or about Dec. 11, 1883, the plaintiff made demand upon the said Pike for the surrender and delivery up of the said note by an instrument dated Dec. 11, 1883, and signed by the plaintiff, which is annexed to the answer of the defendant Pike to the original bill of complaint and marked "A," to which reference is made, notifying the defendant Pike at the same time that he was the owner of an interest in said note for $15,000; that the plaintiff, moreover, on or about April 10, 1885, notified the defendant Swift that he claimed a one-half interest in the said note for $15,000 wrongfully attempted to be pledged by the said Butterfield or Jones to the said defendant, Pike.

And the plaintiff further shows that he is informed and believes that the contract entered into by the said Butterfield with the defendant Pike, dated July 31, 1883, was never performed by either the said Butterfield or the said Pike, but was and has been for some time

totally abandoned by both of them, and that the time within which the same was to be executed has long since expired, but that the said defendant, Pike, still wrongfully retains the said note of $15,000 and refuses to deliver the same to the plaintiff and has brought suit in this honorable court, in the name of said Jones, to whom the said note is made payable, against the defendant Swift to recover the amount thereof to his own use and has obtained judgment, and execution therein has been stayed to await the further order of the court.

To the end, therefore, that the plaintiff may have that relief which he can only obtain in a court of equity, and that process may issue to make said Butterfield, who is without the jurisdiction of this honorable court, a party defendant to this bill of complaint if he should come within its jurisdiction, and that the defendants may answer the premises, but not under oath or affirmation, the benefit of which is expressly waived by the plaintiff, and that the said Pike may be compelled by decree of this honorable court to surrender the said note or instrument for $15,000 now in his possession to the plaintiff or some disinterested person appointed by this honorable court to receive and hold the same for the protection of the interests of the plaintiff and of the other persons interested therein, and that one-half of said note or instrument for $15,000 be decreed to be the property of and due to the plaintiff, and that the said defendant, Swift, be ordered to pay said one-half to the plaintiff and be enjoined from paying the said one-half to any other person whatever, and for such further relief as the nature of this case may require and to your honors may seem meet, may it please your honors to grant unto the plaintiff a writ of subpœna to be directed to the said Charles A. Gregory, Francis A. Pike, William C. N. Swift, and to the said George W. Butterfield, if he should come within the jurisdiction of this honorable court, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and, further, to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

JOHN C. KEMP VAN EE,
By WILLIAM F. WHARTON,
His Solicitor.

WILLIAM F. WHARTON, *Of Counsel.*

* * * * * * *

(Record, page 195.)

Circuit Court of the United States, District of Massachusetts. In Equity.

JOHN C. KEMP VAN EE, Complainant,
v.
CHARLES A. GREGORY *et al.*, Defendants.

Answer of Charles A. Gregory.

(Filed July 14, 1891.)

And now comes Charles A. Gregory, named as a defendant in the bill of complaint of the said Kemp Van Ee, not willing*ingly*, but in obedience to an order of this court passed in the above-entitled cause July 11, 1891, requiring him to file an answer to the said bill entitled a cross-bill in another cause formerly pending in this same court, in which the defendant was plaintiff and one Frederic A. Pike, a citizen of Maine, who died on the second day of December, 1886, was defendant, not hereby waiving or intending to waive his objection to said order as invalid for want of jurisdiction on the part of said court to pass the same and subject to such objection and to his right to urge the same, for answer to said so-called cross-bill says he admits the allegation of the said Kemp that he is a citizen of the Kingdom of Great Britain, but he denies that said Kemp Van Ee is or on the twenty-seventh day of November, 1886, was a defendant to the original bill of complaint of said Gregory against Frederic A. Pike and William C. N. Swift, and denies that said Kemp ever became lawfully entitled to file his said bill of complaint in this court as a cross-bill in the original cause aforesaid of Gregory *v.* Pike and Swift.

And this defendant says that if the bill of complaint of the said Kemp was ever duly and lawfully filed as a cross-bill in the original cause aforesaid, yet that no subpœna or other legal process was ever served on Frederic A. Pike, of Calais, Me., named as one of the defendants therein, but called by mistake Francis A. Pike, and he says the said Pike was never lawfully made or became a party defendant to the said bill of complaint of said Kemp; and this defendant says that on or about the thirtieth day of November, A. D. 1886, he, said Gregory, and the said Pike entered into an agreement in writing for submitting the question of their respective titles to or in the said Swift notes to the determination of the Hon. E. R. Hoar as arbitrator, and that by reason of said submission, so entered into between them, the said original suit in equity brought against the said Pike by him was withdrawn from this court and settled and ceased to be pending as a cause between them in this court, and has not been a pending cause in this court at any time since the execution of the said submission and the delivery of the Swift notes to the said arbitrator in pursuance of said submission, with authority to him to pass over the said notes to whichever of the two he should find to be best entitled to the same; and this de-

fendant says that this submission took effect and the said Swift notes, including the $15,000 note now claimed by the said Kemp in his cross-bill, went out of the possession of said Pike and into the possession of the said arbitrator before the bill of complaint of the said Kemp had ripened into or become a suit against Pike and Swift and Butterfield, the defendants named therein, or either of them.

And this defendant shows that said bill of said Kemp was, viz., on the nineteenth day of October, 1889, dismissed as against the defendant Swift therein named, and, if still lawfully pending against any one, is not so pending against either the said Frederic A. Pike or the said Swift.

And this defendant, further answering, shows that it appears from the said bill of complaint as filed in this court Nov. 27, 1886, that the said Frederic A. Pike was a necessary party to the same, and yet he was never lawfully made a party to the same, but died at his home in Calais, Me., on the second day of December, 1886, without having become a party defendant to said bill; and this defendant says that by reason of said Pike's death, as aforesaid, his interest in the said $15,000 Swift note (claimed by the said Kemp) became devolved on or transmitted to his, the said Pike's, legal representatives, and that they reside in the State of Maine, and that they became necessary parties to said Kemp's bill of complaint in the place or stead of the said Frederic A. Pike, named or intended to be named in the said bill, and that the said legal representatives have not been made parties to said bill of complaint of said Kemp and cannot be made or joined as such parties by reason of their residing beyond the jurisdiction of this court or the reach of its process.

And this defendant, under and by virtue of the provisions of the fifty-second rule of practice for the courts of equity of the United States, suggests to the court that by reason of this state of things the said Kemp's bill of complaint is defective for want of parties. And as to the allegations of the complainant in his said bill of complaint relating to his, the said Kemp's, dealings with one George W. Butterfield and the doings of the said Butterfield this defendant is ignorant and cannot admit or deny the same, but requires proof thereof if material; but this defendant does deny that the said Kemp was at the time of filing his bill the rightful owner of the said $15,000 Swift note or of any part thereof, as alleged by him.

And this defendant denies that the said Kemp, on or about the eleventh day of December, 1883, or at any other time, demanded of the said Pike the surrender and delivery of the said $15,000 Swift note, as alleged by him in his said bill of complaint.

By his solicitor, F. A. BROOKS,

who signs this answer, saving and reserving to said Gregory his exceptions to the order of court requiring him to answer, as hereinabove stated and reserved.

* * * * * * *

(Record, page 246.)

Circuit Court of the United States, District of Massachusetts. In Equity.

CHARLES A. GREGORY
v.
FREDERIC A. PIKE *et al.* } No. 2170.

Final Decree.

March 8, 1894.

COLT, *J.*:

This cause came on to be further heard at this October term, 1893, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

1. That from the fund in the registry of the court in this cause there be paid to the clerk of this court, as required by law in such case, one per cent. upon the whole of said fund.

2. That there be paid from said fund to the administrator of the defendant Swift, deceased, costs, to be duly taxed in favor of said defendant.

3. That for special services in connection with said fund, as set forth in his petition, there be paid to John G. Stetson the sum of eight hundred dollars.

4. That there be paid to the defendant John C. Kemp Van Ee one-half of the proceeds of the fifteen-thousand-dollar note, with the accumulations thereon.

5. That there be paid to Mary H. Pike, executrix of the original defendant, Frederic A. Pike, since deceased, the sum of twenty-five thousand dollars, with interest thereon from Jan. 1, 1884, if the fund remaining in the registry of the court shall be sufficient for the payment, and if not sufficient, the balance of said fund.

6. That the cross-bill of the defendant George W. Butterfield be dismissed.

7. That after the payments hereinbefore decreed to be made to said clerk, the administrator of Swift and Stetson, and the amounts decreed to be paid to Kemp and Pike, as hereinbefore provided, the remainder of the fund, if any, be paid to the plaintiff, Charles A. Gregory.

By the court:

BENJ. H. BRADLEE,
Deputy Clerk.

* * * * * * *

(Record, page 275.)

United States Circuit Court of Appeals for the First Circuit, October Term, 1894.

CHARLES A. GREGORY, Appellant,
v.
JOHN C. KEMP VAN EE, Appellee. } No. 99.

Before Putnam, Webb, and Carpenter, JJ.

Final Decree.

January 31, 1895.

This cause came on to be heard October 25 and 26, 1894, on the transcript of record from the circuit court of the United States for the district of Massachusetts, with—

CHARLES A. GREGORY, Appellant,
v.
MARY H. PIKE, Appel-ee; } No. 98.

THOMAS H. TALBOT, Appellant,
v.
MARY H. PIKE, Ex'x, *et al.*, Appellees, } No. 100.

and

GEORGE W. BUTTERFIELD, Appellant,
v.
CHARLES A. GREGORY *et al.*, Appellees, } No. 101.

on separate appeals, and was argued by counsel.

On consideration whereof it is now, to wit, January 31, 1895, ordered that Thomas H. Talbot, attorney for Mary H. Pike, executrix, recover the amount for services asked for in his intervening petition; that the amount so recovered rank as explained in the opinion filed this day in this case; that the cross-bill of Kemp Van Ee stand as an intervening petition *pro inter esse suo;* that Mary H. Pike, executrix, recover her costs against Gregory in this court and in the circuit court; that Gregory recover his several costs against Butterfield and Kemp Van Ee on their cross-bills, both in this court and in the circuit court; that no other costs be recovered in either court except as expressly stated in the decree entered in the circuit court March eighth, eighteen hundred and ninety-four; that Mary H. Pike, executrix, and Kemp Van Ee be allowed respectively accumulations and interest to the time of the entry of the final decree on the rules applied to him or her in said decree entered said March eighth, and that the case be remanded to the circuit court, with directions to enter a final decree conforming to

this order so far as it goes and in all other respects to said decree entered March eighth, eighteen hundred and ninety-four.

By the clerk:

JOHN G. STETSON, *Clerk.*

* * * * * * *

(Record, page 307.)

United States Circuit Court of Appeals for the First Circuit, October Term, 1894.

CHARLES A. GREGORY, Appellant from Decree of the Circuit Court of March 8, 1894,
v.
JOHN C. KEMP VAN EE, Appellee. } No. 99.

Assignment of Errors.

And now, on this 28th day of March, 1895, comes Charles A. Gregory, the appellant above named, by F. A. Brooks, his solicitor, and says that the decree of said circuit court of appeals, entered in said cause on the 31st day of January last, is erroneous and against the rights of said appellant, Gregory, for the reasons following, to wit:

First. Because from the pleadings and evidence in said cause it appears that said appellee was born in the State of New Jersey and was and (presumptively) is a citizen of said State of New Jersey, and the appellant, Charles A. Gregory, was at the time of the service on him of the bill of complaint of the said appellee a citizen of the State of Illinois, and the said appellant was not liable under the laws of the United States relating to the judiciary to be impleaded by the said John C. Kemp Van Ee in the cause brought by him as aforesaid in the circuit court of the United States holden at Boston, within and for the district of Massachusetts, and because the United States circuit court of appeals had no jurisdictional power or authority to make and enter the order or decree of January 31st, 1895, in favor of the said John C. Kemp Van Ee, as was done by it at that time.

Second. Because the circuit court having ruled and determined in and by its decree of March 8th, 1894, that it was then in possession of the proceeds of a certain note of $15,000 made by Wm. C. N. Swift, and that, in connection with the original cause of Charles A. Gregory against Frederic A. Pike *et al.*, commenced in the State court of Massachusetts and removed to said circuit court, it had lawful power to adjudicate as to the ownership of said note and its proceeds, not only as between the said Gregory, the original plaintiff, and Pike, the original defendant in said suit, but also as between them and one John C. Kemp Van Ee, a stranger to said suit, and having proceeded to determine that said Kemp Van Ee was the owner of one-half of said note or of its proceeds, said to be in possession of the court, and having directed that one-half of the pro-

ceeds of said note be paid to the said Kemp Van Ee from the fund said to be in possession of the court, and the said Gregory having appealed from said decision to the circuit court of appeals, the said circuit court of appeals affirmed the decree of said circuit court in this respect notwithstanding the fact found by said court of appeals, that said Kemp Van Ee had not been made a party to said original bill, and was not entitled to maintain a certain bill of complaint filed by him November 27th, 1886, as a cross-bill in said original suit, and notwithstanding the fact that at the time of filing said cross-bill the $15,000 Swift note in question was in the possession of the defendant Frederic A. Pike, and if it ever afterward came into the possession of said circuit court as a court of equity it did not so come into its possession until the 18th day of July, 1887, a period of seven and a half months after the death of the said Pike.

Third. Because the so-called cross-bill of said Kemp Van Ee having been brought while the $15,000 Swift note was in possession of the said Frederic A. Pike against the said Pike, the said Gregory, the said Swift, and one George W. Butterfield, and having contained prayers of relief against the said Pike and the said Swift personally, and no other prayer or prayers of relief against any person or thing, the said court of appeals determined and decreed that said bill of complaint, though not maintainable as a cross-bill in the original cause of Gregory and Pike, might yet be treated as a petition of the said Kemp Van Ee to intervene *pro inter esse suo*, and, regarding and treating said cross-bill as such an intervening petition, proceeded to hold and decree that the said Kemp Van Ee should have the same benefit of his said cross-bill in that aspect of it as the circuit court had awarded him while treating him as a complainant under said bill of complaint, considered as a cross-bill, thus depriving the said Gregory of all opportunity to contest the right of the said Kemp Van Eee to have his cross-bill treated as an intervening petition in said original cause of Gregory against Pike and Swift and to do this as of a time while the $15,000 Swift note remained in the hands and possession of the said Frederic A. Pike overdue and unpaid.

Fourth. Because, in order that the bill of complaint brought by Kemp Van Ee as and for a cross-bill in the original cause of Gregory against Pike and Swift might be lawfully treated and dealt with by the circuit court as an intervening petition of said Kemp in said original cause, it was necessary that the said Kemp Van Ee should have previously made application to said circuit court for that purpose, and that the defendants to said cross-bill should have had an opportunity to object to such a transformation of said bill of complaint, and that the said circuit court should have passed upon the question of such an alteration or change of the character and purpose of said bill of complaint before giving effect to any such change, and yet the said circuit court of appeals has by its decree undertaken to make this change and to give effect to it and operation retroactively for a period of over eight years, thereby depriving the said Gregory of the benefit of the statute of limitations as a defence to the claim set up by the said Kemp Van Ee.

Fifth. Because an undivided half interest in the unnegotiable promissory note payable to Charles F. Jones and in the actual possession of Frederic A. Pike as pledgee in November, 1886, was not then and is not now the proper subject of a bill of equity running against the said note or against the holder or maker of said note (but not against the payee of the same), brought after said note had been put in suit in an action at law against the maker, Swift, in the name of the payee, Jones, as the circuit court of appeals in its decree of January 31st, 1895, has declared and determined.

Sixth. Because neither the $15,000 Swift note nor any fractional portion thereof nor any sum paid into court thereon in the action at law No. 2435, of Charles F. Jones against Wm. C. N. Swift, was or could have been lawfully treated by the circuit court of appeals as the proper subject-matter of a petition of intervention brought by J. C. Kemp Van Ee, had he seen fit to bring any such petition *pro inter esse suo*, as he never did.

F. A. BROOKE,
Solicitor for the Appellant.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

* * * * * * *

Office Supreme Court, U. S.
FILED.
NOV 20 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 601.

CHARLES A. GREGORY, APPELLANT,

vs.

JOHN C. KEMP VAN EE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION.

RUSSELL GRAY,
Solicitor for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 601.

CHARLES A. GREGORY, APPELLANT,

vs.

JOHN C. KEMP VAN EE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Motion of John C. Kemp Van Ee to Dismiss Appeal.

And now comes John C. Kemp Van Ee, appellee in this cause, and moves to dismiss the above appeal of Charles A. Gregory with costs; and for the ground of this motion he respectfully says that it appears by the record that this cause was duly brought by said Gregory in the supreme judicial court of Massachusetts and was by said Gregory duly removed to the circuit court of the United States for the district of Massachusetts upon the ground of the diverse citizenship of the parties, and upon no other ground (pp. 5 and 6); that the jurisdiction of said circuit court depended en-

tirely upon said diverse citizenship; and said cause was heard and determined in said circuit court, and upon due appeal to the circuit court of appeals for the first circuit was by said last-named court finally determined by its decree dated January 31, 1895 (p. 18), from which decree said Gregory has brought this appeal. It appears by said record that no question or proposition of law has by said court of appeals been certified to this Court for instructions; whereupon said Kemp Van Ee prays as above and has caused to be printed all such parts of the record as bear upon the allowance or refusal of this motion.

By his solicitor, RUSSELL GRAY.

[Endorsed:] Case No. 15,886. Supreme Court U. S., October term, 1895. Term No., 601. Chas. A. Gregory, app't, *vs.* J. C. Kemp Van Ee. Motion to dismiss. Filed Nov. 14, 1895.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1895.

CHARLES A. GREGORY, *Appellant*,
vs.
JOHN C. KEMP VAN EE. } No. 601.

On Motion to Dismiss Appeal.

BRIEF FOR THE MOTION.

This case, originally brought in the supreme judicial court of the State of Massachusetts, was, on application of the plaintiff, removed thence to the circuit court for that district on the ground of the diverse citizenship of the parties, the complainant Gregory being a citizen of the State of Illinois, the defendant Swift a citizen of the State of Massachusetts, and the defendant Pike a citizen of the State of Maine. The removal papers show this ground of jurisdiction in the circuit court, and they show no other ground (p. 5).

After removal, it appearing that J. C. Kemp Van Ee, a citizen of Great Britain, was a necessary party to the suit, the circuit court, on the motion of the defendant Swift (p. 6) and on his own petition (p. 7), ordered him made a party defendant; whereupon he appeared, filed an answer (p. 8) and a cross-bill (p. 11), which Gregory answered (p. 15). The cause was heard and determined in said circuit court, and, upon due appeal to the circuit court of appeals for the first circuit, was by said last-named court fully determined by its decree dated January 31, 1895, wherein it was ordered that the cross-bill of Kemp Van Ee stand as an intervening petition *pro interesse suo*. From this decree Gregory has attempted to appeal to this Court. J. C. Kemp Van Ee, the appellee, seeks to have the appeal dismissed on the following grounds:

The jurisdiction of the circuit court in this case was dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States or being citizens of different States, and the cross-bill or intervention, in whichever form it was properly maintained, being ancillary to the main cause, was dependent on the same ground of jurisdiction.

In such a case the decree of the circuit court of appeals is final unless that court certifies to this Court questions or propositions of law for instructions how to decide them. (Stat. 1891, c. 517, sec. 6.)

That no such certificate has been made in this case appears by the decree (p. 18), which decides the whole case and remands it to the circuit court with directions to proceed in conformity thereto, etc.

RUSSELL GRAY,
For Kemp Van Ee.

FILED.
DEC 21 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 601.

CHARLES A. GREGORY,

Appellant,

v.

JOHN C. KEMP VAN EE,

Appellee.

BRIEF FOR APPELLANT ON MOTION OF APPELLEE FOR DISMISSAL OF THE APPEAL.

E. J. PHELPS,
F. A. BROOKS,

Solicitors for the Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 601.

CHARLES A. GREGORY, *Appellant*,

v.

JOHN C. KEMP VAN EE.

BRIEF FOR APPELLANT UPON MOTION OF APPELLEE FOR A DISMISSAL OF THE APPEAL.

I.

The motion to dismiss this appeal is entitled in the cause of Charles A. Gregory, Appellant, *v.* John C. Kemp Van Ee, and the appellee states the ground of his motion to be that it appears by the record (meaning the record as printed by the appellee for the purposes of this hearing) —

"that this cause was brought by said Gregory in the Supreme Judicial Court of Massachusetts, and was by said Gregory duly removed to the Circuit Court of the United States for the district of Massachusetts upon the ground of the diverse citizenship of the parties, and upon no other ground; that the jurisdiction of said Circuit Court depended entirely upon said diverse citizenship; and said cause was heard and determined in said Circuit Court, and upon due appeal to the Circuit Court of Appeals for the First Circuit was by said last-named Court finally determined by its decree dated Jan. 31st, 1895, from which decree said Gregory has brought this appeal."

The brief filed in support of the motion contains the following recital as to the said cause of Gregory removed from the State Court to the Circuit Court, viz.: —

" After removal, it appearing that J. C. Kemp Van Ee, a citizen of Great Britain, was a necessary party to the suit, the Circuit Court on the motion of the defendant Swift and on his own petition ordered him made a party defendant; whereupon he appeared, filed an answer and a cross bill, which Gregory answered. The cause (meaning the cause of Gregory *v.* Pike *et al.*) was heard and determined in said Circuit Court, and upon due appeal to the Circuit Court of Appeals for the First Circuit was by said last-named court fully determined by its decree dated Jan. 31st, 1895, wherein it was ordered that the cross bill of Kemp Van Ee stand as an intervening petition *pro interesse suo*. From this decree Gregory has attempted to appeal to this Court."

"J. C. Kemp Van Ee, the appellee, seeks to have the appeal dismissed on the following grounds: the jurisdiction of the Circuit Court in this case (meaning the original cause of Gregory and Pike) was dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or being citizens of different States, and the cross bill or intervention, in whichever form it was properly maintained, being ancillary to the main cause, was dependent on the same ground of jurisdiction. In such a case the decree of the Circuit Court of Appeals is final. . . ."

It thus appears that the appellee bases his motion to dismiss upon the assumption or statement that this appeal of Gregory was taken in the old equity cause (No. 2170) of Charles A. Gregory *v.* Frederic A. Pike *et al.*, and that the appellee (Van Ee) was made a party to that old cause; that said old cause was determined by the Circuit Court in favor of said Van Ee, and, on due appeal taken by Gregory from said Circuit Court to the Circuit Court of Appeals, was by said Circuit Court of Appeals finally determined in favor of said Van Ee by its decree of Jan. 31st, 1895.

More briefly, the allegation of the appellee is that the decree of the Circuit Court of Appeals from which Gregory "*has attempted*" to appeal to this Court was made in the cause of Gregory *v.* Pike *et al.*, originally commenced in the State Court of Massachusetts and thence removed to the Circuit Court.

The main question presented by the motion to dismiss is whether or not the jurisdiction of the Circuit Court of any cause lawfully pending therein (March 8th, 1894) as between Kemp Van Ee and Gregory the appellant in this particular case, depended wholly upon the diverse citizenship of these two persons, so that the Circuit

Court would have no jurisdiction unless it was acquired in that way or upon that ground, and so continued down to the time of the final decree.

It does not follow, even if such jurisdiction was originally acquired in that way, and only in that way, that it continued to exist upon that ground down to the time of the final decree. From the transcript (not, however, printed by the appellee for this hearing), it appears that on the 27th day of October, 1891, Kemp Van Ee, in his alleged character of one of the defendants to the old bill of complaint of Gregory against Pike and others, appeared in the Circuit Court, and there presented his motion that the bill of complaint in said cause, Gregory against Pike *et al.*, be dismissed as against him (Kemp Van Ee) for want of a replication by Gregory to the answer made by him, the said Van Ee, to said bill.

Appeal Rec., page 198, bottom.

This motion was heard by the Court and on the 21st of November, 1891, the Court made and entered an order in the old cause, No. 2170, that the bill of complaint of said Gregory (meaning the bill brought originally in the State court as aforesaid in December, 1884) he dismissed as against him, the said Van Ee, a supposed defendant in the old suit. Rec., p. 199.

The appellee claims and contends that the decree of the Circuit Court of Appeals (Jan. 31st, 1895) made (as he alleges) in the old cause of Gregory and Pike was final, because the jurisdiction of the Circuit Court in that old cause as between Kemp and Gregory depended entirely upon the diverse citizenship of the parties to that old cause, including Kemp Van Ee as one of those parties.

While it is true, as stated by the counsel of the appellee in his brief, that the Circuit Court ordered Kemp Van Ee made a party defendant to the old cause of Charles A. Gregory *v.* Frederic A. Pike *et al.*, and that said Van Ee afterward filed a paper entitled his answer as such defendant in said old cause, and did subsequently obtain leave of the Circuit Court, in his pretended character of a

defendant to that old cause, to file a bill of complaint styled a cross bill in said old cause, and entitled John C. Kemp Van Ee, Complainant, *v.* Charles A. Gregory *et al.*, Defendants, and did in fact file such a bill of complaint which was by the clerk of the Circuit Court docketed as a proceeding in said old cause, and was entered under the same docket number (2170) of causes in equity, yet his right to do these things was then and ever since contested by Gregory, and was made one of the grounds of the appeal of Gregory from the final decree of the Circuit Court of March 8th, 1894, in said old cause.

The errors assigned by Gregory as an appellant from that decree of the Circuit Court in said old cause were, among others, the following, viz. :—

"Because this Court in and by its decree . . . has admitted or recognized John C. Kemp Van Ee as a party to said cause and has declared and held him to be entitled to litigate therein as a party defendant to said cause as fully as if he had been joined as a defendant thereto by and with the consent of the plaintiff; and has determined and decreed that said Kemp Van Ee is entitled to be paid a certain sum from or out of moneys said to be subject to the disposal of the Court, among or between the . . . parties to the above-entitled cause of Gregory against Frederic A. Pike, and another being equity cause No. 2170, etc.

"Because . . . it appears that the plaintiff Gregory was a citizen . . . of Illinois and that . . . Kemp Van Ee was born in the State of New Jersey and was not made a party defendant to the plaintiff's bill of complaint, and was not found in this district or served with process in this cause as such defendant, so that this Court never had or could by law have or exercise any jurisdiction of said cause, as between the said Gregory and the said Kemp Van Ee, . . . and consequently . . . could not lawfully make or enter any decree whatever in said cause in favor of the said Kemp Van Ee as a party to the above-entitled cause, for want of jurisdiction as between the plaintiff and the said Kemp Van Ee. And the said Gregory submits the following . . . statement or specification . . . of certain orders or rulings of the Court in said cause prior to the entry of the final decree to which exceptions are taken by him as erroneous: . . .

"1. The order of Court made Jan. 22d, 1886, granting the petition of John C. Kemp Van Ee for making him a party defendant to the above-entitled cause.

"2. The order of Court passed Jan. 22d, 1886, granting the motion of W. C. N. Swift for making John C. Kemp Van Ee a party defendant to said cause.

"3. The order of Court passed Nov. 27th, 1886, granting Kemp Van Ee leave to file a bill of complaint, called by him a cross bill, in the cause of Gregory against Pike and Swift. . . .

"7. The order of Court of Jan. 24th, 1891, overruling the demurrer of Gregory filed Nov. 1st, 1890, to the bill of complaint of John C. Kemp Van Ee.

"8. The order of Court passed July 11th, 1891 overruling the plea of Gregory to the bill of John C. Kemp Van Ee.

Transcript of Appeal Record, p. 249–251.

[The foregoing assignment of errors in the old cause of Gregory and Pike has not been printed by the appellee for this hearing though it is deemed by the appellant material, and for that reason is copied into this brief.]

From the foregoing statement, it is, we think, shown that the appellant, in his assignment of errors, challenged the jurisdiction or lawful authority of the Circuit Court to make a final decree in favor of Kemp Van Ee as a party to the old equity cause (2170), as matters stood March 8th, 1894, when said final decree was made, and had a right so to do and to have a revision by the Circuit Court of Appeals of every matter specified as erroneous in his said assignment of errors.

We now limit our discussion to Gregory's rights as an appellant from the decree, so far as that decree related to Kemp Van Ee as an alleged party to the old equity cause of Gregory against Pike and Swift.

An examination of the opinion of the Circuit Court of Appeals filed with the decree of Jan. 31st, 1895, will show that the positions taken by Gregory in the Circuit Court, and in his appeal from the Circuit Court to the Circuit Court of Appeals in the old equity cause of Gregory and Pike, to the point that Kemp Van Ee was not made a party to that old cause and had no right to liti gate therein under or by virtue of his bill of complaint, styled improperly a cross bill therein, were fully sanctioned and sustained by the Court of Appeals. That Court ruled and held in terms that Kemp Van Ee's "*cross bill was unauthorized and should be dismissed*" just as had been contended by Gregory in the Circuit Court.

To sustain our assertion in this respect, we quote from the opinion of the Circuit Court of Appeals, as follows: —

"As to the proceedings by which Kemp Van Ee was made a defendant in Gregory's bill and permitted to file a cross bill, Swift, who was a defendant, petitioned that Kemp Van Ee should be made a defendant, and Kemp Van Ee also petitioned to be made defendant, and both petitions were allowed, so that he properly stands as a defendant, if he could be made such, either on the petition of Swift or on his own. . . .

"In the way attempted in the present case, there are no pleadings on behalf of the original plaintiff as against Kemp Van Ee, and could be none. The whole basis of making him a party defendant was in the allegations of Swift's answer. . . .

"It is true that in the case at bar, if Kemp Van Ee was properly made a party, he was able to file a cross bill; so that, although the original bill was dismissed as to the new defendant, bringing him in would not necessarily fail of results. We must, however, judge of the question by general rules, applicable to suits where there would be no basis for filing cross bills. . . .

"As Kemp Van Ee was improperly made a defendant, it follows that his cross bill was unauthorized and should be dismissed. . . .

"So far as the original bill was concerned he (Kemp) was dismissed from it on his own motion under Equity Rule 66, so that when the cross bill is dismissed, the irregularity will have been wholly obviated. In King *v.* McLean Asylum, 64 Fed. Rep. 331, the authorities to the effect that an irregularity, subsequently obviated, is not ground for a reversal or modification, were collected and the rule was reaffirmed."

The foregoing quotation from the opinion of the Circuit Court of Appeals shows that that Court ruled and held that the old cause of Gregory, Pike, and Swift did not include Kemp Van Ee as one of the parties to the same, either as a volunteer defendant or as plaintiff in the bill styled a cross bill, and consequently that the motion of the appellee to dismiss this appeal is based upon the mistaken idea or assumption that the appeal of Gregory in this particular case was taken in the old cause of Gregory against Pike and Swift.

II.

We have thus far endeavored to show that Gregory's appeal in this particular case was not taken by him as party plaintiff to the old cause of Gregory against Pike and Swift, commenced in the State

court of Massachusetts, and that the Circuit Court of Appeals had so determined, and thereby to show (negatively) and satisfy the Court that Kemp Van Ee's motion to dismiss this appeal is without any basis of fact to support it.

We will now go a step further and endeavor to show that the appeal of Gregory, now before this Court, from the decision of the Circuit Court of Appeals in cause No. 99 on the calendar of that Court, was taken in the new cause commenced by Kemp Van Ee as complainant in a certain bill of complaint brought by him as sole plaintiff against Charles A. Gregory, Frederic A. Pike, W. C. N. Swift and one George W. Butterfield in the Circuit Court, Nov. 27th, 1886, and purporting to be resorted to by Kemp as a defendant in the old cause of Gregory against Pike and Swift. Rec., p. 11.

In this bill of complaint the plaintiff, Kemp, recites or says "that he is a defendant, by order of this Honorable Court, to the original bill of complaint against the said . . . Pike and . . . Swift, by Charles A. Gregory, a copy of the full record of which case and all the proceedings therein is hereto annexed, and marked "A."

Rec., p. 11.

The copy of record here referred to is the record in the cause of Gregory against Pike and Swift, as made up and printed for the final hearing of that cause in the Circuit Court at the October Term of said Court, A. D. 1886, when said cause had been set down for final hearing as between Gregory and Pike, and said final hearing at that time was prevented by the filing of Kemp's so-called cross bill by leave of the Circuit Court then obtained.

In order to make it clear to this Court that Gregory appealed to the Circuit Court of Appeals as defendant in Kemp's case, and not as plaintiff in the old cause No. 2170 against Pike and Swift, we invite the attention of the Court to portions of the transcript of record on file, but not printed by the appellee for this hearing.

By reference to page 247 of the transcript of record it will be seen that Gregory took an appeal not only in the old cause brought by him as plaintiff against Pike and Swift, but also in the cause brought

by Kemp Van Ee, as plaintiff, against Charles A. Gregory and others, as defendants, and that Gregory made a separate and distinct assignment of errors as defendant to said suit of Kemp against him. Transcript of Record, p. 252.

As this assignment of errors is not furnished by the appellee, we copy the same into this brief. It is as follows: —

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

OCTOBER TERM, 1893.

JOHN C. KEMP VAN EE, *Complainant in Equity*,

v.

CHARLES A. GREGORY AND GEORGE W. BUTTERFIELD, *Defendants*.

ASSIGNMENT OF ERRORS.

And now on the ninth day of March, A. D. 1894, comes Charles A. Gregory, defendant above named, and says that in the record and proceedings in the above entitled cause, and in the decree entered therein, there is manifest error, because from the pleadings and evidence in said cause it appears that said complainant was born in the State of New Jersey, and was and (presumptively) is a citizen of said State of New Jersey, and the defendants, Charles A. Gregory and George W. Butterfield, were, at the time of the filing of the complainant's said bill of complaint, citizens respectively of the States of Illinois and California, and were not liable under the laws of the United States relating to the judiciary to be impleaded by the said John C. Kemp Van Ee, in the aforesaid cause brought by him in the Circuit Court of the United States, holden at Boston, within and for the District of Massachusetts. And because this Honorable Court did not have any jurisdictional power or authority to make and enter any order or decree whatever in said cause in favor of the said John C. Kemp Van Ee.

CHARLES A. GREGORY,
by his Solicitor,
F. A. BROOKS.

Although the bill of complaint of Kemp Van Ee against Gregory and others is printed at page 11 of the extracts of record as printed, and this bill was filed in the Circuit Court Nov. 27th, 1886, it does not appear from the record, as printed, that any action was taken or had in the Circuit Court upon that bill until July 14th, 1891, or for a period of nearly five years after it was filed.

If this Court were in possession of the full transcript of record it would appear that no subpœna was ever sued out by Van Ee upon this bill of complaint until Dec. 6th, 1886; that Frederic A. Pike, one of the persons named as a defendant in said bill, was not then living, and of course was never served with the subpœna or made a defendant to said suit in any way.

It would also appear that this bill of Kemp was dismissed, as to the defendant Swift, by an order of the Circuit Court passed Oct. 19th, 1889 (Rec., p. 190), thus leaving Gregory and Butterfield the only remaining parties defendant to the same.

It would also appear that the defendant Gregory demurred to said bill of complaint, Nov. 1st, 1890; that his said demurrer was heard by the Circuit Court and overruled Jan. 24th, 1891.

Transcript of Record, pp. 190 and 192.

It would also appear that Gregory then (Feb. 14th, 1891) pleaded to Kemp's bill of complaint, that this plea was not replied to but was set down for argument and heard by the Court and overruled (July 11th, 1891) and that Gregory at the same time was ordered to answer the bill of complaint of said Van Ee, within one week from that day.

Transcript of Record, pp. 192 and 194.

It would also appear that Gregory then (July 14, 1891), in obedience to the order of the Court, but under protest that said order of Court requiring him to answer was invalid, and reserving his objection to the jurisdiction of the Court in said cause, filed an answer to said bill of complaint, which answer is printed at pages 15 and 16 of the record furnished by the appellee.

It would also appear that Kemp Van Ee filed a replication to Gregory's answer (July 18th, 1891) (Rec , p. 197), and that then, for the first time, Kemp and Gregory were at issue as parties to said

bill of complaint, one of the issues so framed relating to the jurisdiction of the Circuit Court of the said cause as between the said Kemp and Gregory and as between the said Kemp and Frederic A. Pike, deceased, said suit having been previously dismissed as to the defendant Swift.

It would also appear that Van Ee then (Dec. 9th 1891) applied to the Court for an extension of time for taking evidence in said cause, and procured such extension of time and thereupon, on the 5th day of March, 1892, proceeded to take and did take his own deposition. Transcript of Record, p. 200–215.

An examination of that deposition will disclose the fact that Kemp Van Ee was born in New Jersey and was not an alien or entitled as such to litigate as plaintiff in the United States Circuit Court of Massachusetts, and that neither Gregory nor Butterfield could be lawfully impleaded by him in the suit brought against them by him in the Circuit Court for the District of Massachusetts, and that said Circuit Court was without jurisdiction of said cause as set forth by Gregory in his assignment of errors in this case. Rec., p. 252.

It was this appeal of Gregory as a defendant to Kemp Van Ee's bill of complaint upon which the Circuit Court of Appeals passed judgment in cause No. 99 on the calendar of that court, from which judgment or decree the defendant Gregory was allowed to take, and did take the appeal now before this Court.

This is manifest from the assignment of errors made by Gregory as appellant in the Circuit Court of Appeals printed at page 19 of the record on this motion; and it is very clear, from the language used by the Circuit Court of Appeals in its opinion in said cause (No. 99), that it did not consider Kemp Van Ee as entitled to prevail as plaintiff in the bill of complaint brought by him, even though that bill of complaint were to be regarded as a new cause, entirely separate and distinct from the old cause of Gregory and Pike, as it was in fact regarded, or seemed to be, by the Circuit Court of Appeals in its opinion.

The Circuit Court of Appeals in deciding cause No. 98, between Gregory and Mary H. Pike (old No. 2170), held that Kemp had

no standing as a party to that old cause either as a defendant to the same, or as a plaintiff in the so-called cross bill therein.

That Court of course was obliged to follow that same ruling and apply it to the appeal cause of Gregory and Kemp, being cause No. 99 on its calendar, and it did so.

In its opinion in Cause No. 99, it said among other things, —

"As Kemp Van Ee was improperly made a defendant" (meaning in the old equity cause of Gregory against Pike and Swift) "it follows that his cross bill was unauthorized and should be dismissed. So far as the original bill was concerned he was dismissed from it on his own motion under Equity Rule 66. So that when the cross bill is dismissed the irregularity will have been wholly obviated."

Kemp's bill of complaint, here referred to as a cross bill in the old cause (No. 2170), was thus finally disposed of by the Circuit Court of Appeals by directing that it be dismissed. The Circuit Court of Appeals further said in its opinion, —

"As . . . he (Kemp) volunteered himself as a party defendant and brought a cross bill . . . he ought to be required to pay costs on the cross bill in this court and in the court below."

After this, certainly, it cannot be claimed by Kemp that anything was left him as plaintiff in his so-called cross bill or as a litigant therein with the defendant and appellant Gregory in cause No. 99 in the Circuit Court of Appeals, so that Gregory had no occasion to take an appeal to this Court from that decision, so far as that decision related solely to any rights accorded to Kemp as plaintiff in that bill of complaint, whether that bill was taken as part of the old cause or as a separate and distinct cause by itself.

In either view of it, it was to be dismissed with costs to the defendants, and Gregory had no occasion to pursue his defence to it any further, or to appeal from that portion of the decree.

III.

It so happened however that while the Circuit Court of Appeals in its decision had held and determined that Kemp had no rights as a litigant with Gregory under the final decree of the Circuit Court made March 8th, 1894, as the pleadings then stood either in the old cause or under the bill of complaint brought and prosecuted by

Kemp against Gregory and others, yet that by giving to Kemp's bill of complaint the force and effect of a petition of intervention in the old cause of Gregory against Pike and Swift, a very different result might follow, and that Court, thereupon, proceeded to rule and hold, and did rule and hold in the two appeal causes Nos. 98 and 99, and did say that there was

"*no rule touching the merits or the necessities of technical proceedings, which prevents this Court from regarding his* (Kemp's) *cross bill as such a petition*" (meaning a petition of intervention by Kemp, *pro interesse suo*). " . . . This Court may, therefore, on the principles already laid down treat the cross bill of Kemp Van Ee as, in effect, a petition to intervene and confirm the decree" (of Circuit Court) "in his behalf for the amount determined to be due him."

Opinion of Court, Jan. 31st, 1895.

In pursuance of the theory thus conceived and adopted by the Circuit Court of Appeals and promulgated by it for the first time in its opinion of Jan. 31st, 1895, without any opportunity having been afforded to Gregory as a defendant to the bill of complaint to combat or question such a metamorphosis of Kemp's bill of complaint, the Circuit Court of Appeals in and by its decree determined and declared

"*that the cross bill of Kemp Van Ee stand as an intervening petition, pro interesse suo*; . . . that Gregory recover his . . . costs against Kemp Van Ee on the cross bill, both in this court and in the Circuit Court; . . . and that the case be remanded to the Circuit Court with directions to enter a final decree conforming to this order, so far as it goes, and in all other respects to said decree entered March 8th, 1894." Rec., p. 18.

Here was a new element introduced into the cause by the Circuit Court of Appeals itself and brought to the knowledge or attention of the appellant Gregory in the appeal cause (No. 99), Jan. 31st, 1895, for the first time. No such suggestion had ever before been made by any one at the hearings had in the Circuit Court or in the Circuit Court of Appeals.

If, by reason of anything found in Section 6 of the appellate court's Act, this ruling and decision was not a proper subject of appeal by

Gregory, and if the Circuit Court is required by that Act to carry into execution this decision and decree without affording Gregory any opportunity of being heard thereon, then probably the motion of the appellee for a dismissal of this appeal should prevail. But no such ruling as that can, we think, be adopted without infringing that clause of the United States Constitution (5th amendment) which provides that no person "shall be deprived of life, liberty or property without due process of law."

It was this particular ruling of the Circuit Court of Appeals and this alone from which Gregory sought to escape by taking the appeal in question. The ground of this appeal was and is that it was not within the lawful power or authority of the Circuit Court of Appeals under the circumstances to alter or change Kemp's bill of complaint in a cause *in personam* so as to convert it, without the request of Kemp or notice thereof previously given to Gregory, into an intervening petition and to give it legal force and effect as such a petition retrospectively for a period of eight years prior to the announcement by the Court of such a purpose.

IV.

Not only was this appeal of Gregory claimed by him upon this ground; it was allowed him by the Circuit Court of Appeals upon the understanding that he was lawfully entitled to such appeal upon this ground.

The case of Rouse *v.* Letcher, 156 U. S., page 47, was supposed by Gregory to authorize this appeal and was so understood, as we believe, by the Circuit Court of Appeals at the time said appeal was claimed and allowed.

The Circuit Court of Appeals had ruled and held that Kemp's bill of complaint here in question was not a proceeding in the old cause of Gregory and Pike, or incidental or auxiliary to that old cause, and that Kemp had no *locus standi* as a party to or in connection with that old cause. The case of Rouse *v.* Letcher cannot, therefore, be regarded as adverse to Gregory's right of appeal from the decision of the Circuit Court of Appeals.

It was not understood by the Circuit Court of Appeals that Kemp Van Ee had any right to litigate in the old cause of Gregory and Pike, in any character or capacity whatever, prior to the time of filing his bill of complaint improperly styled a cross bill. It was, however, supposed by that Court that at some stage of the old cause (No. 2170) a fund had accumulated in the hands of the Court in that old cause for distribution among the parties entitled thereto; that under that state of facts Kemp Van Ee had filed his bill of complaint, and that his said bill might, for that reason, be treated as a petition of intervention by him.

It is not necessary for the purposes of this motion to dismiss nor is it even permissible for us to inquire whether this understanding of the Circuit Court of Appeals was correct or not. It is sufficient for our present purpose that such was its understanding and that it acted upon such an understanding in granting or allowing the appeal claimed by Gregory to this court; in other words, that appeal was properly allowed, if its purpose was to revise the decision of the Circuit Court of Appeals as to the rights of Kemp Van Ee as a claimant of funds said to be in the possession of the Circuit Court at the time of the final decree (March 8th, 1894) for distribution by that Court.

The jurisdiction of the Circuit Court of such a proceeding *in rem* could not be said, under such circumstances, to depend either solely or partially upon the diverse citizenship of the parties to such proceeding.

This Court said in Rouse *v.* Letcher (156 U. S. 47), —

"It is well settled that where property is in the actual possession of a Court this draws to it the right to decide upon conflicting claims to its ultimate possession and control, and that where assets are in the course of administration all persons entitled to participate may come in under the jurisdiction acquired between the original parties by ancillary or supplemental proceedings."

It had already been decided by the Circuit Court of Appeals that Kemp Van Ee had not obtained any standing in the Circuit Court under the jurisdiction acquired between the original parties in the cause of Gregory and Pike.

Hence it seems to follow that Kemp's claim, if any, must rest solely

upon the fact that he had a lawful right to share in the property or fund supposed to be in possession of the Court, and upon no other ground. The Court of Appeals in its decision and decree acted upon this theory, and awarded Kemp the same sum or amount as had been awarded him by the Circuit Court upon an entirely different theory of his relation to the old equity cause of Gregory and Pike. It was found by the Circuit Court of Appeals that the Circuit Court had rested its decision in favor of Kemp upon a ground that was not tenable, but the Circuit Court was directed to adopt an entirely different theory as to the basis of Kemp's claim and to allow him the same amount upon such different theory, though there was nothing in the pleadings or proofs to justify the Circuit Court in making such a change of base, and though no such change of base by the Circuit Court was legally possible, unless and until the pleadings should have been made to conform to the new theory of facts suggested by the Court of Appeals.

The defendant Gregory seeks by his appeal to test the legal validity of such a change of base by an appellate court in the absence of any action whatever had for the purpose in the trial court.

The single question now before this Court is whether such a decree and decision as this made by the Court of Appeals, in the absence of any action whatever in the trial Court, is final and conclusive and binding upon the parties in the trial court, or is subject to revision by this Court.

We respectfully submit that there is nothing in the appellate court's Act of 1891 to prevent a revision of this decision by the Supreme Court, and that such a revision should be allowed unless clearly prohibited by the terms of the Act.

We cannot think it was intended by the appellate court's Act to take away from a litigant in the United States Courts of Equity the right of appealing from any decision or decree of the Circuit Court of Appeals of any matter of dispute or controversy which had not been passed upon at all by the trial court, or presented to the trial court in such a form as to admit of its being passed upon by that court.

If such is the interpretation of the act as it now reads, it must have been the result of inadvertence, and no such construction of the Act should, we think, be favored by this Court.

If we are correct in our statement of the questions raised and presented by the appellant Gregory in the appeal allowed him in this case, it is, we think, very clear that the questions so raised by him were not raised in the old cause originally brought by him against Pike and Swift in the State court of Massachusetts, and thence removed to the Circuit Court, as set forth in the motion of Kemp Van Ee to dismiss, so that it becomes wholly immaterial whether the jurisdiction of the Circuit Court over that cause did or did not depend in whole or in part upon the diverse citizenship of the parties to said cause, as is represented by the appellee in his motion to dismiss this appeal, which representation is made the sole ground of his said motion to dismiss.

According to the opinion and decision of the Circuit Court of Appeals, the jurisdiction of the Circuit Court as between Kemp Van Ee and Gregory in this particular suit, brought by Kemp against Gregory, did not depend upon the citizenship of the parties, and did not exist at all, unless Kemp's bill of complaint is regarded as brought by him as a claimant of property supposed to be in possession of the Circuit Court at the time; that is to say, it depended upon the subject-matter in litigation, and not upon the citizenship of the respective claimants.

In Morgans L. & T. R. & S. Co. *v.* Texas R. R. Co. (137 U. S. 171), it was held by this Court where property was in the actual possession of the Circuit Court, that that Court had the right to decide upon conflicting claims made to its ultimate possession and control; and that in such case the jurisdiction of the Court depended not on the citizenship of the parties, but on the subject-matter of the litigation.

E. J. PHELPS,
F. A. BROOKS,
of Counsel for the Appellant.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 601.

CHARLES A. GREGORY,

Appellant,

v.

JOHN C. KEMP VAN EE,

Appellee.

OBJECTIONS OF APPELLANT GREGORY TO THE SUFFICIENCY OF THE RECORD ACCOMPANYING APPELLEE'S MOTION FOR DISMISSAL OF THE APPEAL.

E. J. PHELPS,
F. A. BROOKS,

Solicitors for the Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 601.

CHARLES A. GREGORY, *Appellant*,

v.

JOHN C. KEMP VAN EE.

Objections of the Appellant to a Hearing of the Motion to Dismiss upon the Record furnished by the Appellee, because of its being Defective and Insufficient.

And now the appellant, Charles A. Gregory, above named, comes and says that the record as printed by the appellee, for the hearing of his motion to dismiss the appeal, is not sufficient to enable the Court to pass understandingly upon that motion.

It contains only twenty-one pages out of the three hundred and thirty-six pages of the transcript of record on file in the cause.

It does not contain the assignment of errors filed by Gregory in the Circuit Court at the time of taking his appeal from the final decree of that Court in the cause, so that it does not show the grounds or reasons of the first or fundamental appeal.

It does not contain the opinion of the Circuit Court of Appeals filed by that Court at the time of making the decree from which this appeal is taken, so that this Court is not furnished by the appellee with a knowledge of the grounds upon which the decrees made by the Circuit Court and the Circuit Court of Appeals were appealed from, or sought to be revised.

If these omitted portions of the transcript of record were supplied, it would appear that the appellee was not at any time a party to the cause of Charles A. Gregory against Frederic A. Pike *et al.* as represented by the appellee in his motion; or if he ever was duly made a party to said old cause, that he had ceased to be a party thereto by reason of an order of the Court below, passed upon his own motion, Nov. 21, 1891, as set forth at page 199 of the transcript of record, so that in either case, at the time of the final decree in said old cause, Kamp Van Ee was a stranger to that old cause, and consequently was not entitled to the benefit of the decree of the Circuit Court in his favor, made March 8, 1894, in that old cause.

It would likewise appear that while the Circuit Court in January, 1886, passed a certain order in the old cause of Gregory against Pike and Swift, admitting Kemp Van Ee into that old cause and purporting to make him a party defendant to the same, yet that the Circuit Court of Appeals ruled and held the action of said Circuit Court in that respect to have been invalid in law and void, and thus overruled the Circuit Court in the orders and decrees made by it for the purpose of introducing the appellee as a party to the old cause aforesaid in which this motion is said to be made.

If the full transcript of appeal record were now before the Court, it would also appear that one of the grounds of the appeal taken by Gregory from the final decree of the Circuit Court was that that Court had no lawful jurisdiction under the bill of complaint of the appellee, as between them, by reason of the fact that the complainant Kemp Van Ee was a citizen of New Jersey, and that Gregory was a citizen of Illinois. Transcript of Rec., p. 252.

The full transcript of record, if before the Court, would show that the decision made by the Circuit Court of Appeals furnishes no countenance whatever to the position taken by the appellee in his motion, but proceeds upon a very different theory, as to the relation of Kemp Van Ee to the cause, from that set forth in the motion to dismiss this appeal.

St. Louis Bank *v.* Insurance Co., 100 U. S. 43.
City Waterville *v.* Slyke, 115 U. S. 290.

In order to establish the truth of these statements of the appellant respecting the insufficiency of the record furnished for this hearing by the appellee, the appellant has caused to be prepared and sub, mitted herewith a brief, into which portions of the appeal record, omitted by the appellee, have been copied, to which brief the attention of the Court is respectfully invited, if it is disposed to entertain the motion to dismiss, at all, under the circumstances above stated.

E. J. PHELPS,
F. A. BROOKS,
Solicitors for the Appellant.